United States Court of Appeals

for the Second Circuit

BRIEF FOR APPELLEE

76-7123

To be argued by
THOMAS COYNE

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Pls

United States Court of Appeals

FOR THE SECOND CIRCUIT

GIUSEPPE CAPOTORTO,

Plaintiff-Appellant,

—against—

COMPANIA SUD AMERICANA DE VAPORES, CHILEAN LINE, INC.,

Defendant-Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NEW YORK

BRIEF FOR DEFENDANT-APPELLEE

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Statement

On September 30, 1974 plaintiff-appellant commenced an action against Compania Sud Americana de Vapores in the United States District Court for the Southern District of New York (74 Civ. 4274) to recover damages for personal injuries allegedly sustained on October 6, 1972 while he was working as a longshoreman in the employ of Pittston Stevedoring Corp. aboard the SS IMPERIAL, a vessel owned by the defendant-appellee.

On December 24, 1974 he executed a general release for the gross sum of $16,182.57 ($12,500 net) (116a) and on December 30, 1974 his attorney filed an order of discon-

tinuance in which it was recited that the case had been settled.

Thereafter, plaintiff-appellant decided not to go through with the settlement and on May 15, 1975 another attorney commenced an action against Compania Sud Americana de Vapores in the United States District Court for the Eastern District of New York (75 Civ. 750) for a declaratory judgment declaring a nullity the general release admittedly executed by plaintiff-appellant (1a).

On September 29, 1975, plaintiff-appellant commenced still another action against Compania Sud Americana de Vapores in the United States District Court for the Eastern District of New York (75 Civ. 1601) seeking damages for the injuries he allegedly sustained aboard the SS IMPERIAL on October 6, 1972.

The action for a declaratory judgment was tried before the Honorable John R. Bartels on March 1 and 2, 1976 without a jury and resulted in a finding that the general release executed by plaintiff-appellant was valid in all respects (113a).

The present appeal is from Judge Bartels judgment in 75 Civil 750.

Facts

On October 6, 1972, while he was working as a longshoreman in the employ of Pittston Stevedoring Corp. aboard the SS IMPERIAL, plaintiff-appellant allegedly slipped, fell and injured his back (19a, 20a). His employer, Pittston, sent him to Drs. Ritzman and Tagliagambe for treatment and to Dr. Vaccarino for an examination (21a). Drs. Ritzman and Vaccarino told him he had a sprained back (21a, 22a). The last time he received treatment for this injury was in February, 1973 (27a).

He returned to work as a longshoreman in February, 1973 (47a) and continued to work until June, 1974 when he fell aboard another ship and reinjured his back (43a). After four months of treatment, he returned to work as a longshoreman in the middle of October, 1974 (49a). He continued to work until the first week in January, 1975 (49a).

Plaintiff-appellant had engaged Attorney Martin Lassoff of the firm of Zimmerman and Zimmerman to represent him (22a). Mr. Lassoff, a practicing attorney for 22 years, specializes in maritime law and has handled between 5,000 and 10,000 cases involving personal injuries to longshoremen (59a).

Mr. Lassoff had Capotorto examined several times by Drs. Campbell and Graubard (72a, 74a, 80a) and he had in his possession reports of Drs. Ritzman, Tagliagambe, Vaccarino, Abramson and Holman. Dr. Holman is an impartial orthopedic specialist for the United States Department of Labor (72a).

Mr. Lassoff entered into settlement negotiations with Mr. Wayne Billyer, a claims agent representing the defendant-appellee, and they agreed to recommend to their respective clients that the case be settled for $16,182.57 inclusive of the workmen's compensation lien or a net settlement of $12,500 (63a).

Capotorto received a letter from Mr. Lassoff asking him to see Mr. Lassoff with reference to the possible settlement of the case (65a, 115a). He appeared in Mr. Lassoff's office on December 24, 1974. Mr. Lassoff said he had a settlement offer from the shipowner's representatives and told Capotorto how much money he would receive. He made it clear that plaintiff-appellant could not make another claim against the owners of the SS

IMPERIAL after he signed a general release and that he would not be able to get any more money (66a, 67a, 71a). Capotorto then executed the release (66a).

Within one-half hour after Capotorto signed the release, Mr. Lassoff received a telephone call from Mr. Michael Conzo, who speaks Italian. He asked Mr. Lassoff to go over the figures with him, which he did (71a). At the trial, Mr. Lassoff pointed out Mr. Conzo, who was sitting in the courtroom. Mr. Maddalena, plaintiff-appellant's trial counsel interjected that he had subpoenaed Mr. Conzo as a rebuttal witness, but he elected not to call him to the stand (71a).

Plaintiff-appellant testified that Mr. Lassoff did not promise him any more money (51a). He admitted that he had prosecuted a prior action to recover damages for personal injuries in 1963 (43a). At that time he was represented by Attorney Paul Gritz and the case was settled. He had to sign a paper when this claim was settled but he professed to remember nothing about it (44a, 45a).

According to Mr. Capotorto, when he returned to work in October, 1974, after his intervening accident in June, 1974, his back pain was the same as it had been in 1972, but it gradually increased (50a). He sought further medical treatment in January, 1975 and was told by Dr. Vaccarino that he had a herniated disc (50a).

Dr. Vaccarino was called as a witness for plaintiff-appellant. He testified that in January, 1975 he made a diagnosis of a herniated disc based on clinical findings (R26). On cross examination, he admitted he could not say that the accident of October 6, 1972, of the three back injuries sustained by plaintiff-appellant, was the cause of a herniated disc (R62). He also admitted that a myelogram had not been performed (R55).

After being informed of Dr. Vaccarino's diagnosis, Capotorto visited Mr. Lassoff and said he wanted to start a new claim for the 1972 injury (29a, 30a). He was told he could not do this because he had signed a general release (31a).

The defendant-appellee is ready to pay the agreed on settlement sum of $12,500 and has been at all times since the release was executed, but plaintiff-appellant refuses to consummate the settlement.

Summary of Argument

After a full trial, the lower court found the release executed by plaintiff-appellant to be "in all respects valid" (113a).

This finding was not based on plaintiff-appellant's supposed failure to sustain a burden to overcome the release, but it was based on the entire evidence presented by both parties from which the court was persuaded that the release was valid.

The question of burden of proof, therefore, is not relevant here, as distinguished from whether the lower court's persuasion was clearly erroneous. That it was not clearly erroneous will be demonstrated under POINT I, page 6 below.

Since plaintiff-appellant has raised the issue of burden of proof, however, defendant-appellee discusses this under POINT II, p. 9 below. We submit that if this issue were relevant, which it is not, the burden of proof as to the invalidity of a release discharging a shipowner from a personal injury claim should be on the longshoreman (who is not a crew member) particularly where, as here, he seeks affirmative relief by a declaratory judgment.

POINT I

The Judgment Below Is Not Clearly Erroneous.

The scope of review exercised by appellate tribunals in maritime cases is no greater than they exercise under Rule 52(a) of the Federal Rules of Civil Procedure. *McAllister* v. *United States,* 348 U.S. 19 (1954). A finding is clearly erroneous when although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction a mistake has been committed. *United States* v. *Oregon Medical Society,* 343 U.S. 326, 339 (1952); *United States* v. *United States Gypsum Co.,* 333 U.S. 364, 395 (1948).

Rule 52(a) of the Federal Rules of Civil Procedure reads, in part as follows:

> ". . . Findings of fact shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge of the credibility of the witnesses. . . ."

The court heard the testimony of Dr. Vaccarino, plaintiff-appellant and his attorney, Mr. Lassoff, and had the opportunity to judge their credibility. Judge Bartels found that Capotorto was told his case could be settled for $16,182.57 and that his share, after deduction of the compensation lien and attorney's fee would be $6,750 (109a); that Capotorto's lawyer told him that the signing of the release would end the case and that he could not bring any further suits against the defendant (109a) and that Capotorto knew he was signing a release (111a). This certainly was an adequate and fair sum to receive for a back sprain that produced a maximum four month disability (49a; 47a).

The court rejected Dr. Vaccarino's testimony that Capotorto sustained a herniated disc caused by the accident of October 6, 1972 (111a), and found plaintiff neither had nor thought he had a herniated disc (112a). The court held that in the circumstances as found Capotorto could not have been misled in signing the release (112a).

The court also found no fraud or misrepresentation on the part of the shipowner defendant and held the release valid in all respects (111a).

These findings which rested principally on the lack of credibility of Capotorto's evidence, are not clearly erroneous.

This was not Capotorto's first settlement. He had a prior accident in 1963 (43a) and had previously signed a release settling that claim (44a). The fact is that the lower court rejected his testimony, which he improperly attempts to review on appeal (brief for plaintiff-appellant p. 11) claiming that his attorney told him he was suffering from a sprain when in fact he was suffering from a herniated disc. The lower court explicitly found Capotorto did not have nor did he believe he had a herniated disc (112a).

Capotorto, at trial, admitted that apart from the four month disability resulting from the sprain, he continued to work regularly (49a) and received no treatment until he sustained a later unrelated accident in 1974 when he saw Dr. Vaccarino (47a). The lower court also rejected Capotorto's evidence that Dr. Vaccarino found a herniated disc related either to the accident at issue or to the subsequent accident of 1974 (111a).

The brief of plaintiff-appellant suggests the lower court followed state law and found unilateral mistake existed on his part. Neither is correct. The court stated it was

making "no findings whatsoever with respect thereto" (113a). Nor is there anything in the record which indicates the court ignored Federal Maritime Law. Even under the stringent standards used to determine the validity of crew member's releases, if applied to this case, the court did not err in holding the release executed by Capotorto to be valid.

In *Clinton* v. *United States,* 254 F. 2d 409, 410 (9th Cir. 1958), cert. den. 358 U.S. 941 (1959), the court, citing cases, listed the following factors that have influenced courts to hold a seaman-crew member's release invalid:

> 1. The seaman-crew member signed the release while suffering from the effects of the injury which limited his ability to fully comprehend the effect of the release.
>
> 2. The seaman-crew member was not represented by an attorney at the time he signed the release.
>
> 3. The release was executed after the inaccurate diagnosis of the seaman-crew member's injury by doctors employed by the shipowner led him to believe his injuries were not as extensive as they eventually turned out to be.
>
> 4. The shipowner's claim agent failed to inform the seaman-crew member of all his rights before the release was signed.
>
> 5. The seaman-crew member was under an economic strain at the time of the signing.

The lumbosacral sprain allegedly sustained by Capotorto on defendant-appellee's vessel on October 6, 1972 did not limit his powers of comprehension when he signed the general release on December 24, 1974. He was represented

by a thoroughly experienced attorney. The shipowner did not have him examined by any doctors, but his employer had him treated by two doctors and examined by two other doctors. His lawyer had him examined by two doctors and the United States Department of Labor had him examined by an impartial orthopedic specialist. All of them diagnosed a lumbosacral sprain—not a herniated disc. The shipowner's claims agent never spoke with Capotorto. And finally, Capotorto was under no economic strain at the time he signed the general release.

None of the factors that have influenced courts to invalidate seamen's releases is present in this longshoreman's case.

POINT II

Releases Given to Shipowners by Longshoremen Should Not be Treated in the Same Way as Releases Given by Crew Members to Their Shipowner Employers.

In *Garrett* v. *Moore-McCormack Co.*, 317 U.S. 239 (1942), it was held that the burden is upon one who sets up a crew member's release to show that the release was executed freely, without deception or coercion, and that it was given by the crew member with full understanding of his rights. The court added that the adequacy of the consideration and the nature of the medical and legal advice available to the crew members at the time of signing the release were relevant to an appraisal of this understanding. It was then stated that this general admiralty rule applied not only to actions for maintenance and cure but also to actions under the Jones Act, 46 U.S.C. §688—two actions which cannot be commenced by longshoremen.

Citing *Wooten* v. *Skibs A/S Samuel Bakke*, 431 F. 2d 821 (4th Cir. 1970), *Panama Agencies Co.* v. *Franco*, 111

F. 2d 263 (5th Cir. 1940) which held that a Panamanian longshoreman injured aboard an English ship in the Canal Zone could sue his stevedore employer under the Jones Act, *W.J. McCahan Sugar Refining and Molasses Co.* v. *Stoffel,* 41 F. 2d 651 (3d Cir. 1930)—a case which held a longshoreman was a seaman who could sue under the Jones Act, and then citing two textbooks, appellant argues that the burden of proof with respect to the validity of the release is on the shipowner.

A reading of the *Wooten* case reveals that the trial court granted summary judgment against a longshoreman, holding that his action was barred by a release. The only physicians who examined Wooten were selected by his employer's compensation carrier. He was not represented by an attorney. The court held that the validity of the release was a question of fact. The court also held that the burden of proof was on the shipowner, citing *Seas Shipping Co.* v. *Sieracki,* 328 U.S. 85 (1946). The latter case held the shipowner owed a duty of furnishing a seaworthy vessel to longshoremen. It did not deal with releases.

But longshoremen are not seamen in the real sense and they do not have all the rights a seaman enjoys. For example longshoremen cannot sue to recover maintenance and cure; they cannot sue under the Jones Act, 46 U.S.C. §688, *Swanson* v. *Marra Brothers, Inc.,* 328 U.S. 1 (1946); nor can they recover two days' pay for each and every day during which payment of wages is delayed beyond specified times. (46 U.S.C. §596).

It is significant that railroad workers, who are covered by the Federal Employers' Liability Act, 45 U.S.C. §51, a statute that is incorporated into the Jones Act, 46 U.S.C. §688, have the burden of proving the invalidity of a release they are attacking. In *Callen* v. *Pennsylvania R. Co.,* 332 U.S. 625 (1947), it was said:

". . . The releases of railroad employees stand on the same basis as the releases of others. One who attacks a settlement must bear the burden of showing that the contract he has made is tainted with invalidity, either by fraud practiced upon him or by a mutual mistake under which both parties acted."

In 1 Norris, *The Law of Maritime Personal Injuries,* 3rd Ed. (1975), one of the textbooks cited by appellant, the question is discussed in the following language:

"The Fourth Circuit has declared that longshoremen's releases given to shipowners are to be treated similarly as releases given by seamen. The policy of scrutinizing with extreme care a release given by a seaman to ascertain whether he has been overreached or whether he has understood the meaning of the act of releasing his rights has been shaped by the solicitude which the admiralty court has historically accorded to the 'wards of admiralty.'

Longshoremen, albeit performing but one phase of the seamen's traditional activities, are shorebased workers with roots in the land. Living ashore and working at the edge of land they are a part of urban society. Surrounded by family, relatives, friends, neighbors, lawyers and union personnel, where counsel and guidance are readily available they are not, unlike seamen, cut off and isolated from the community. Therefore, they are not in any real sense different from millions of other workers ashore. To treat longshoremen, where releases are involved, as virtually 'wards of admiralty' is, in the opinion of this writer, neither necessary nor desirable." At page 11.

CONCLUSION

Plaintiff-appellant executed this release freely and without deception or coercion. He knew he was giving up his rights against the shipowner defendant.

The settlement sum was certainly adequate—$16,182.57 for a lumbosacral sprain which disabled him from his job as a longshoreman only from October, 1972 to February, 1973.

He had competent legal and medical advice.

It is significant that plaintiff-appellant's brief makes no mention of the subsequent accident on another ship in June, 1974 when Capotorto admittedly reinjured his back. In pursuing this second claim against the owner of the other ship, will he assert that his back condition was caused by the second accident and not by the accident of October 6, 1972? And will he support this claim by showing the prior accident involved only a lumbosacral sprain from which he completely recovered, pointing out as proof of his recovery that he was able to work as a longshoreman for 15 months from February, 1973 until the subsequent accident in June, 1974?

Even when judged by the standards applicable to a crew member's release, the general release executed by Capotorto is valid in all respects and the judgment below should be affirmed.

Dated: May 21, 1976

Respectfully submitted,

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LOUIS J. GUSMANO
of Counsel

U.S. Court of Appeals
for the Second Circuit

---x

Capotorto

Plaintiff, - Appellant

-against-

Compania Sud Americana De Vapores

Defendant - Appellee

---x

STATE OF NEW YORK)
: ss.:
COUNTY OF NEW YORK)

Sabrina Deutsch, being duly sworn, deposes and says:

On the 21st day of May, 1976, I served 2 copies of the within Brief for Defendant - Appellee upon Sergi + Fetell Counsel to Joseph Maddalena, Esq. - Appellant, the attorney for the above-named plaintiff - Appellant, by depositing a true copy of the same securely enclosed in a post-paid wrapper in a Post Office Box regularly maintained by the United States Government at 120 Broadway, New York, New York, directed to said Counsel to the attorney for the plaintiff - Appellant at No. 44 Court St Brooklyn, New York, that being the last known address designated for the purpose on the preceding papers in this action or the place where they kept an office.

Sabrina Deutsch

Sworn to before me this
21st day of May, 1976

George E. Dalton
Notary Public

GEORGE E. DALTON
Notary Public, State of New York
No. 31-4615702 Qualified in N. Y. County
Term Expires March 30, 1977

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